Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

GERALD ALLAN MISCOVICH,

Petitioner,

vs.

ELIZABETH O. MISCOVICH,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE PENNSYLVANIA SUPREME COURT,
MIDDLE DISTRICT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the presumption of paternity, that a child born or conceived during a marriage is a child of the husband which may not be rebutted by scientific evidence (DNA testing) unless and until non-access, impotence or sterility is demonstrated, violate the husband-presumed father's right to procedural due process of law under the Fourteenth Amendment?

2. Does the presumption of paternity, that a child born or conceived during a marriage is a child of the husband which may not be rebutted by scientific evidence (DNA testing) unless and until non-access, impotence or sterility is demonstrated, violate the husband-presumed father's right to substantive due process of law under the Fourteenth Amendment?

3. Does the state interest in "preserving" non-intact family units outweigh an individual's right not to be deprived of property (money for child support) and liberty (jail for failure to pay) without due process of law?

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OPINIONS AND ORDERS BELOW

The Order of March 12, 1996, of the Court of Common Pleas of Berks County, Pennsylvania, Case No. 95-1692-00, denying the Petition of Gerald Miscovich for the Introduction of DNA Test Results and/or Blood Tests, and the Memorandum Opinion of that Court dated March 8, 1996, are unreported. They are reproduced in the Appendix to this Petition.

The Opinion of the Superior Court of Pennsylvania in this case, No. 1340 PHL 1996, is reported as *Miscovich v. Miscovich*, 455 Pa. Super. 437, 688 A.2d 726 (1997). It is reproduced in the Appendix. The Court's Order of that same date is also reproduced in the Appendix.

The Order of the Supreme Court of Pennsylvania, No. 36 M.D. Appeal Docket 1998, dated December 14, 1998, affirming because the Court was equally divided, three to three, is reported at __ Pa. __, 720 A.2d 764 (1998). It is reproduced in the Appendix. It is dated December 14, 1998. The Supreme Court of Pennsylvania did not issue an Opinion.

STATEMENT OF JURISDICTION

The Order sought to be reviewed, a *per curium* Order of the Supreme Court of Pennsylvania affirming the Order of the Superior Court of Pennsylvania was entered December 14, 1998. No Petition for Rehearing was filed, nor has the Petitioner sought an extension of time to file this Petition.

Jurisdiction is conferred on this Court by 28 U.S.C. § 1257.

Although the statute involved in this case could be interpreted in a manner that does not violate the Constitution of

the United States, petitioner challenges the constitutionality of the manner in which a Pennsylvania statute, 23 Pa. C.S. § 5104(c) is interpreted. Therefore, 28 U.S.C. § 2403(b) may apply, and this Petition is being served on the Honorable D. Michael Fisher, Attorney General of the Commonwealth of Pennsylvania, as required by Rule 29.4(c).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Amendment XIV, Section 1, to the Constitution of the United States, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

23 Pa. C.S. § 5104(c), provides:

> Authority for test. — In any matter subject to this section in which paternity, parentage or identity of a child is a relevant fact, the court, upon its own initiative or upon suggestion made by or on behalf of any person whose blood is involved, may or, upon motion of any party to the action made at a time so as not to delay the proceedings unduly, shall order the mother, child and alleged father to

submit to blood tests. If any party refuses to submit to the tests, the court may resolve the question of paternity, parentage or identity of a child against the party or enforce its order if the rights of others and the interests of justice so require.

STATEMENT OF THE CASE

Petitioner, Gerald Miscovich, and Respondent, Elizabeth Miscovich, were married on July 26, 1986. A child, Gerald Anthony Miscovich, was born to Elizabeth on December 28, 1987. Gerald and Elizabeth separated in October 1989. On March 9, 1990, they signed a property settlement agreement which included terms for child support. A divorce decree was entered on December 12, 1990.

During the marriage Elizabeth led Gerald to believe that he was the father of the child. She kept up that pretense after the parties separated and divorced. In December 1991, Gerald learned of the part of Mendel's Law called the law of dominance; that is, because both Gerald and Elizabeth have blue eyes and the child has brown eyes, Gerald could not be the child's father. He promptly had DNA analysis performed on himself and the child by the American Red Cross in January 1992. That scientific test completely excluded Mr. Miscovich as the child's father.

When he received the results, Mr. Miscovich ceased any contact with the child. While she continues to take the position in these proceedings that Gerald Miscovich is the father, Elizabeth also filed a support action against a third party.

The issues were first raised in a petition filed by Gerald Miscovich in the Court of Common Pleas of Berks County,

Pennsylvania, at No. 95-0169-00, on August 29, 1995.[1] Gerald Miscovich averred the performance of DNA testing, and attached the report that excluded him as the father of the child. He sought a stay of support payments pending final determination of the proceedings, and discovery.[2] In its Opinion dated March 8, 1996, and its March 12, 1996 Order, the Common Pleas Court refused to allow a hearing. This was because the presumption of paternity[3] and the inability of Gerald Miscovich to claim that he was incapable of procreation or did not have access to his wife during the period of conception, concluded the issue of paternity against him.

A timely appeal was taken to the Superior Court of Pennsylvania on April 12, 1996. Deprivation of due process is addressed on pages 16 through 19 of the Brief of Gerald

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1. In 1992 and 1993 the parties tried to negotiate a settlement. In 1994 Elizabeth had the third party tested. Elizabeth did not file this support action until May, 1995.

2. Under Pennsylvania decisional law, only facts are to be pleaded. The Court is presumed to know the law and is to apply any theory supported by those facts. *Burnside v. Abbott Laboratories*, 351 Pa. Super. 264, 277, 505 A.2d 973, 980 (1985); *Heinly v. Pennsylvania*, 153 Pa. Cmwlth. 599, 605, 621 A.2d 1212, 1215, n.5 (1993).

3. Courts sometimes refer to this as the "presumption of legitimacy". In *John M. v. Paula T.*, 524 Pa. 306, 571 A.2d 1380, *cert. denied*, 498 U.S. 850 (1990), the Supreme Court of Pennsylvania ruled that because the status of illegitimacy has been abolished by statute, 23 Pa. C.S. § 5102(a), the presumption would be referred to as the presumption of paternity. Since most states have abolished the disabilities of illegitimacy, we will refer to this presumption as that of paternity, notwithstanding that a number of the decisions discussed in this Petition call it the "presumption of legitimacy".

Miscovich filed in that Court on July 15, 1996. The Superior Court of Pennsylvania affirmed, on January 10, 1997, *Miscovich v. Miscovich*, 455 Pa. Super. 437, 688 A.2d 726 (1997).

A Petition for Allowance of Appeal to the Supreme Court of Pennsylvania was filed on February 6, 1997, and granted on April 7, 1998. The due process issues presented were addressed in the brief filed with that Court on May 26, 1998, on pages 13 through 19. That court affirmed in an Order entered December 14, 1998, because it was equally divided. __ Pa. __, 720 A.2d 764 (1998).

REASONS FOR GRANTING THE WRIT

ALTHOUGH THIS COURT HAS ADDRESSED THE PRESUMPTION OF PATERNITY IN THE CONTEXT OF AN ALLEGED NATURAL FATHER'S CHALLENGE, IT HAS NOT ADDRESSED THE IMPORTANT ISSUE OF WHETHER THIS PRESUMPTION, WHICH PROHIBITS PROOF THROUGH RELIABLE SCIENTIFIC METHODS, DEPRIVES THE PRESUMED FATHER OF HIS PROPERTY AND LIBERTY. THE DECISION BELOW ALSO IS IN CONFLICT WITH DECISIONS OF OTHER STATE COURTS OF LAST RESORT INTERPRETING STATE DUE PROCESS PROVISIONS.

Notwithstanding the existence of scientific evidence that positively excluded Gerald Miscovich as the father of the child, the courts below denied a hearing because Gerald was unable to offer the proof of sterility, impotence or non-access that is required to overcome the common law presumption of paternity.[4]

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4. Given modern pharmaceuticals, transportation and conjugal visits, very few people could overcome this presumption, making it all but irrebuttable.

The Pennsylvania Supreme Court affirmed by a vote of three to three. The decisions of the lower courts are based on decisions of the Supreme Court of Pennsylvania that hold, notwithstanding a statute allowing scientific evidence where "relevant", 23 Pa. C.S. § 5104(c), that this evidence is not relevant when the common law presumption applies.

The pertinent statute, 23 Pa. C.S. § 5104(c), quoted above, allows the Court to order the parties to submit to blood tests. In *John M. v. Paula T.*, 524 Pa. 306, 571 A.2d 1380, *cert. denied*, 498 U.S. 850 (1990), the Supreme Court of Pennsylvania interpreted the statutory language, "In any matter subject to this section in which paternity . . . is a *relevant* fact . . ." (emphasis added), to make the fact of paternity relevant only when the common law presumption of paternity is overcome. The husband of the mother is conclusively presumed to be the child's father. That presumption was relaxed somewhat in *Jones v. Trojak*, 535 Pa. 95, 634 A.2d 201 (1993) and *Brinkley v. King*, 549 Pa. 241, 701 A.2d 176 (1997), where the parties separated prior to the birth of the child. The Pennsylvania Supreme Court in those cases also considered and applied the related doctrine of estoppel. This establishes paternity and precludes testing when the child has been held out to be the child of, or has been supported by, the person who contests paternity.

This Court addressed the presumption ten years ago in *Michael H. v. Gerald D.*, 491 U.S. 110, 105 L. Ed. 2d 91, 109 S. Ct. 2333 (1989), a plurality decision dealing with the claim of a man tests showed was most likely the father of a child born during the marriage of the mother to another man. It involved facts considered by this Court to be "extraordinary". 491 U.S. at 113. The California statute prohibited a third party from seeking testing, although it

allowed a husband-presumed father to seek blood testing within two years of the date of birth. *Michael H.* concerned an alleged fundamental right of a natural father who was seeking to establish the status of co-father, previously unknown to the law.

The present case involves a situation that is more ordinary and usual. Pennsylvania common law creates an absolute prohibition against a hearing, and against the use of reliable scientific evidence, simply because the child was conceived or born during the marriage. The far from extraordinary situation in this case is that a married woman, while cohabiting with her husband, had sexual relations with another man, and a child was born. The husband was led to believe he was the father, and learned he was not two years after the parties separated and divorced. The underlying right of that husband involves property and liberty interests specifically protected by the due process clause. The issues in this case were resolved without a hearing, without even considering whether the stated purpose of the presumption, preservation of intact families, was served. Gerald must pay money for the support of another man's child. Should he fail to make those payments he is subject to imprisonment. This is property and liberty in the literal sense.

The alleged state interest behind the presumption, preservation of the "family unit", *see Miscovich v. Miscovich*, 455 Pa. Super. 437, 688 A.2d 726, 728 (1997), cannot outweigh the deprivation of property and liberty suffered by the man who is presumed to be the father. The state's interest in these matters is only the fair and impartial adjudication of disputes. *Rivera v. Minnich*, 483 U.S. 574, 581, n.8, 97 L. Ed. 2d 473, 107 S. Ct. 3001 (1987). It is not an interest that can withstand analysis since it treats married men (presumed

fathers) differently than unmarried men (natural fathers), and allows children born during wedlock no right to find their true father, while giving that right to children born out of wedlock. As a result of this, children born during wedlock are unable to learn the medical history of their true parents, jeopardizing their health in general and where transplants or stem cell transplants are necessary. They are also unable to meet the strong psychological need to find their true parents.

Several State Supreme Courts have followed *Michael H.* in holding that a natural father does not have the necessary liberty interest to overcome the presumption of paternity. *E.g.*, *Paternity of C.A.S.*, 161 Wis.2d 1015, 468 N.W.2d 719 (1991); *Ex parte Presse*, 554 So.2d 406 (Ala. 1989). Other courts have declined to follow *Michael H.* and interpret due process clauses of their state constitutions to allow the presumption to be rebutted by scientific evidence. In *C.C. v. A.B.*, 406 Mass. 679, 550 N.E.2d 365 (1990), the Supreme Judicial Court of Massachusetts held that a putative third party father is entitled to present scientific evidence to overcome the presumption when he shows by clear and convincing evidence that he has a relationship with the child. In *Interest of J.W.T.*, 872 S.W.2d 189 (Tex. 1994), the Texas Supreme Court abolished the presumption of paternity under that state's "due course of law" guaranty, and held that a putative father has standing to sue for visitation with a child who has a presumed father. In *State ex rel. Roy Allen S. v. Stone*, 196 W. Va. 624, 474 A.2d 554 (1996), the Supreme Court of West Virginia abolished the presumption of paternity if the putative father establishes a substantial parental relationship with the child. Iowa's intermediate appellate court, in *In re Marriage of Bethards*, 526 N.W.2d 871 (Iowa App. 1994), allowed the husband-presumed father to challenge his presumed paternity with scientific evidence.

At the end of the twentieth century science has advanced to the point of being able to determine, with certainty, whether a man is not the biological father of a child. In this case, the lower courts made that determination without considering any evidence. The presumption of paternity, based on English common law of 1569 (*see Michael H.*, 491 U.S. at 124), has been applied to deprive Gerald Miscovich of a hearing, and of his substantive rights not to have his property used for the support of another man's biological child. While this Court rejected the supposed liberty interest of the putative natural father in *Michael H. v. Gerald D.*, 491 U.S. 110, 105 L. Ed. 2d 91, 109 S.Ct. 2333 (1989), it has not addressed the due process rights of the presumed father, and should do so in this case.

CONCLUSION

For the foregoing reasons this Court should grant the Petition for Writ of Certiorari, and issue a Writ of Certiorari to the Supreme Court of Pennsylvania.

Respectfully submitted,

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APPENDIX A — ORDER AND OPINION OF THE SUPERIOR COURT OF PENNSYLVANIA DATED AND FILED JANUARY 10, 1997

"JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of Berks County be, and the same is hereby AFFIRMED."

Elizabeth O. MISCOVICH

v.

Gerald Allan MISCOVICH, Appellant.

Superior Court of Pennsylvania
No. 1340 PHL 1996

Filed Jan. 10, 1997

* * *

Before CIRILLO, P.J.E., and SAYLOR and HOFFMAN, JJ.

CIRILLO, P.J.E.:

In this paternity action, appellant Gerald Allan Miscovich appeals from a final decree of the Court of Common Pleas of Berks County, denying appellant's request for admission of DNA results and/or blood testing and releasing funds in escrow for payment of child support. We affirm.

Appendix A

The parties were married on July 16, 1986. On December 28, 1987, appellee Elizabeth O. Miscovitch gave birth to a son. Within two years, in October of 1989, the parties separated. On March 9, 1990, the parties signed a property settlement agreement, which included terms for payment of child support. The parties were divorced on December 12, 1990. At no time during the separation or divorce proceedings did Gerald question his paternity.

Two years later, in January of 1992, Gerald became suspicious of his paternity.[1] Gerald submitted himself and the child to DNA analysis. The analysis excluded Gerald as the child's father. In March of 1992, Gerald ceased all contact with the child and informed the child that he was not his father. The child, at that time, was four years old.

When Elizabeth was confronted with the DNA test results, she filed a support action against a third party on behalf of her son. At that time, Elizabeth was receiving Public Assistance. She was also attending a post-secondary education program.

In the support action, the trial court refused to order blood testing and refused to admit evidence of DNA analysis into trial. The court applied the presumption that a child born to a married woman is a child of the marriage. The court also determined that because appellant had failed to present clear and convincing evidence of non-access, sterility or impotency, the presumption could not be overcome. See John M. v. Paula T., 524 Pa. 306, 571 A.2d 1380, cert. denied, 498 U.S. 850, 111 S.Ct. 140, 112 L.Ed.2d 107 (1990); Paulshock v. Bonomo, 443 Pa.Super. 409, 661 A.2d 1386 (1995).

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1. Appellant explains that his suspicion was based on the fact that he and his wife both had blue eyes, and his child had brown eyes.

Appendix A

On appeal, Gerald raises the following issues:

1. Whether the trial court erred in finding that the presumption of paternity applied where there is not an intact family, the mother has filed for support against a third party, and there has been no contact with the child since 1992?

2. Whether the trial court erred in ignoring the plain language of the blood testing statute by refusing to order testing to rebut the presumption of paternity?

3. Whether the trial court erred in applying [sic] the doctrine of estoppel despite the fact that the mother fraudulently concealed the issue of non-paternity and the appellant ceased any contact with the child immediately upon learning that he was not the father?

4. Whether the trial court erred in failing to hold a hearing on the application of the presumption of paternity and the appellant's request for paternity testing?

The presumption that a child born during a marriage is a child of the marriage arose from the reluctance of the law to declare a child "illegitimate," because the status "illegitimate" historically subjected a child to significant legal and social discrimination. [citations omitted].[2]

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2. Throughout history, illegitimate children were precluded from, among other legal rights, entering certain professions. The Book of Deuteronomy states:

(Cont'd)

John M., 524 Pa. at 312 n. 2, 571 A.2d at 1383 n. 2. In Pennsylvania, the General Assembly has eliminated the legal distinction (and discrimination) between "legitimate" and "illegitimate" children. The General Assembly has declared all children to be legitimate:

> All children shall be legitimate irrespective of the marital status of their parents, and in every case where children are born out of wedlock, they shall enjoy all the rights and privileges as if they had been born during the wedlock of their parents except as otherwise provided in Title 20 (relating to decedents, estates and fiduciaries).

23 Pa.C.S. § 5102(a).[3]

(Cont'd)

> a bastard shall not enter into the congregation of the Lord; even to this tenth generation shall he not enter into the congregation of the Lord.

Duet. 23:2.

> At common law, a child born out of wedlock, referred to as a bastard, was considered a non-person and was not entitled to support from the father or inheritance from either parent. 1 W. Blackstone, Commentaries 459; Davis v. Houston, 2 Yeates 280 (1878).

Kohler v. Bleem, 439 Pa.Super. 385, 390 n.1, 654 A.2d 569, 572 n.1.

3. The Pennsylvania Supreme Court announced, in John M., supra, that it would no longer "use the phrase 'presumption of legitimacy' to describe the 'presumption that a child born to a married woman is a child of the marriage,' and therefore of the woman's husband." John M., 524 Pa. at 312 n. 2, 571 A.2d at 1384 n. 2.

Appendix A

The strength of the presumption that a child born to a married woman is a child of the marriage, is grounded in the Commonwealth's interest in protecting the family unit. See Commonwealth ex rel. O'Brien v. O'Brien, 390 Pa. 551, 136 A.2d 451 (1957); see also John M. v. Paula T., 524 Pa. 306, 571 A.2d 1380 (1990), cert. denied, 498 U.S. 850, 111 S.Ct. 140, 112 L.Ed.2d 107 (1990); Coco v. Vandergrift, 416 Pa.Super. 444, 611 A.2d 299 (1992); McCue v. McCue, 413 Pa.Super. 71, 604 A.2d 738 (1992); Donnelly v. Lindenmuth, 409 Pa.Super. 341, 597 A.2d 1234 (1991). In John M., supra, our supreme court reaffirmed the force of this presumption, labeling it "one of the strongest presumptions known to law." Id. at 312-13, 571 A.2d at 1383 (citing Cairgle v. American Radiator & S.S. Corp., 366 Pa. 249, 77 A.2d 439 (1951)). Although the presumption is rebuttable, one who attempts to overcome it bears a heavy burden. See Jones, supra; see also Selm v. Elliott, 411 Pa.Super. 602, 603-05, 602 A.2d 358, 359 (1992).

Traditionally, the presumption could be overcome only by proof that the husband did not have access to his wife during the period of possible conception, or by proof of the husband's impotency or sterility. See John M., 524 Pa. at 313-15, 571 A.2d at 1384; see also Commonwealth ex rel. O'Brien v. O'Brien, 390 Pa. 551, 136 A.2d 451 (1957) (the presumption of legitimacy can be overcome only by proof that the husband did not have access to his wife during the period of possible conception, or by proof of the husband's impotency or sterility); Kohler v. Bleem, 439 Pa.Super. 385, 654 A.2d 569, appeal denied, 541 Pa. 652, 664 A.2d 541 (1995) (clear and convincing evidence of husband's vasectomy and subsequent lack of spermatozoa in his semen rebutted the presumption that child born during marriage was child of the marriage). At common

law a child born of a married woman was conclusively presumed to be legitimate unless her husband was not within the four seas which bounded the kingdom, but later it was held that the presumption of legitimacy could be overcome if the husband and wife lived at a distance from each other so that access was very improbable. This was the rule applied in Pennsylvania in 1814. Commonwealth v. Shepherd, 6 Binney 283, 286. Commonwealth ex rel. Goldman v. Goldman, 199 Pa.Super. 274, 282-84, 184 A.2d 351, 355 (1962).

The evidence offered to rebut the presumption must be clear and convincing. See McCue v. McCue, 413 Pa.Super. 71, 604 A.2d 738, appeal denied, 531 Pa. 655, 613 A.2d 560 (1992). Additionally, the presumption is overcome if "the court finds that the conclusions of all the experts as disclosed by the evidence based upon the [blood] tests show that the husband is not the father of the child." 23 Pa.C.S.A. § 5104(g).[4]

Before us, then, is the interplay between the presumption of paternity and the interpretation of the Uniform Act on Blood Tests to Determine Paternity. See 23 Pa.C.S.A. § 5104. Also before us, as it relates to our interpreting of the Act, is the viability of the presumption of paternity. Cf. John M. v. Paula T., 377 Pa.Super. 72, 546 A.2d 1162 (1988), reversed on other grounds, 524 Pa. 306, 571 A.2d 1380, cert. denied, 498 U.S.

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4. In Jones v. Trojak, 535 Pa. 95, 634 A.2d 201 (1993), our supreme court stated that a court "may order blood tests to determine paternity only when the presumption of paternity has been overcome." Id. at 105, 634 A.2d at 206, (citing John M. v. Paula T., 524 Pa. 306, 571 A.2d 1380, cert. denied, 498 U.S. 850, 111 S.Ct. 140, 112 L.Ed.2d 107 (1990)). As we noted in Kohler, supra, the statute is somewhat anomalous in light of our supreme court's pronouncement in Jones, supra. See Kohler, 439 Pa.Super. at 392 n. 4, 654 A.2d at 573 n. 4.

850, 111 S.Ct. 140, 112 L.Ed.2d 107 (1990). We attempt to impose an order on these concepts in light of the various factual permutations which arise in paternity cases. The rules differ for each scenario.

Our first inquiry is whether the child was born during or out of wedlock. The applicable principles differ depending upon the child's status in this respect. If a child is born out of wedlock, the presumption, obviously, is inapplicable. The determination of paternity, then, turns on the application of the estoppel principles to the particular facts of the case. See In the Matter of Naja Green, 437 Pa.Super. 606, 650 A.2d 1072 (1994); Jefferson v. Perry, 432 Pa.Super. 651, 639 A.2d 830 (1994); cf. Everett v. Anglemeyer, 425 Pa.Super. 587, 625 A.2d 1252 (1993). See also 23 Pa.C.S.A. § 5102(b).[5] If paternity has been established by estoppel, blood tests and evidence to rebut the

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5. As stated above, the General Assembly has codified the principle of paternity by estoppel in cases of children born out of wedlock. 23 Pa.C.S.A. § 5102(b). The relevant section provides:

> (b) For purposes of prescribed benefits to children born out of wedlock by, from and through the father, paternity shall be determined by any one of the following ways:
>
> * * *
>
> (2) If during the lifetime of the child, the father openly holds out the child to be his own and receives the child into his home, or openly holds out the child to be his and provides support for the child which shall be determined by clear and convincing evidence.

23 Pa.C.S.A. § 5102(b).

presumption of paternity are irrelevant. See Jones, supra; John M., supra; Gulla v. Fitzpatrick, 408 Pa.Super. 269, 596 A.2d 851 (1991); see also Freedman v. McCandless, 539 Pa. 584, 654 A.2d 529 (1995) (where estoppel is applied, blood test may be irrelevant because the law will not permit a person in estoppel situation to challenge the status previously accepted; only when estoppel is inapplicable will blood tests be ordered).[6]

With respect to a child born during wedlock, if the presumption of paternity has not been rebutted with clear and convincing evidence, as the trial court determined in this case, blood tests may not be ordered. See Jones, supra; John M., supra. Cf. 23 Pa.C.S.A. § 5104 (g) ("The presumption of legitimacy of a child born during wedlock is overcome if the court finds that the conclusions of all experts as disclosed by the evidence based upon the tests show that the husband is not the father of the child."). Where the presumption of a husband's paternity has not been overcome, blood tests are not a relevant fact. See Jones, supra; John M., supra. See also Selm v. Elliott, 411 Pa.Super. 602, 602 A.2d 358 (1992) (paternity becomes a relevant fact in an action against a putative father only when the presumption against the presumptive father has been overcome); Paulshock v. Bonomo, 443 Pa.Super. 409, 661 A.2d 1386 (1995) (blood tests are irrelevant where the presumption of a husband's paternity has not been overcome).

If the presumption of paternity has been rebutted by clear and convincing evidence, paternity becomes a relevant fact and

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6. We note that where the paternity of a child born out of wedlock is disputed, the court, upon the request of any party to an action to establish paternity, "shall require the child and the parties to submit to genetic tests." 23 Pa.C.S.A. § 4343(a); 23 Pa.C.S.A. § 4343(c) (1996 supp.).

blood tests may be ordered. Selm, supra. Even then, however, the right to blood tests is not absolute. Following rebuttal of the presumption that a child born during the marriage is a child of the husband, a party's right to a blood test must be balanced against competing societal or family interests. See McCue, supra; Donnelly v. Lindenmuth, 409 Pa.Super. 341, 344, 597 A.2d 1234, 1235 (1991); see also Woy v. Woy, 444 Pa.Super. 232, 234-35, 663 A.2d 759, 760 (1995) ("when a wife engages in sexual relations with a man, not her husband, during intermittent separations from her husband, a child born to her enjoys the 'presumption of legitimacy' absent clear and convincing proof of the husband's inability to procreate or lack of access to his wife at the time of conception.").

Finally, the presumption is irrefutable where the mother, child and husband live together as an intact family, with the husband assuming parental responsibility. The conclusive nature of the presumption exists in this scenario even if a third party claims the husband's sterility or non-access. See John M., supra; Jones, supra.

Our society has embarked upon an era in which the usefulness of the presumption of legitimacy as a legal tool must be questioned. Overcoming the presumption is fast becoming virtually impossible. Advancements in technology, in all its forms, medicine to air travel, have muddled clear and convincing rebuttal, altering the substance of the presumption. The level of difficulty of rebuttal is raised, purely by advancements in technology, and the legislature and our courts must make necessary adjustments in the law. It becomes necessary, then, to revisit the policies underlying the presumption, and insure that the equilibrium has not been shifted to a point of inequity.

In keeping with this principle, it is suggested that the protection of the traditional family unit need not be dictated by the presumption. We need not blindly apply it, nor cling to timeworn principles to support the Commonwealth's goal of protecting the family. A careful analysis of each factual scenario, in particular the relationship between the presumptive or putative father and child, see Gulla, supra, as well as the "known factor" of a putative father against whom a support claim may be made, is necessary to fair and just application of paternity law.

A review of recent decisions in the courts of this Commonwealth bear this out. In addition to application of the presumption and analysis of whether it has been rebutted, recent decisions in the courts of this Commonwealth have considered whether the purpose of the presumption is served under the particular facts of the case. See, e.g., Jones, 535 Pa. at 106-07, 634 A.2d at 207 "we agree with the Superior Court that there being no intact family considerations present, a determination regarding Trojak's [putative father's] paternity is necessary to resolve the child support claim made by Jones [mother]."; Kohler v. Bleem, 439 Pa.Super. at 397-401, 654 A.2d at 576-77 (in addition to consideration of evidence rebutting the presumption of paternity, the court considered the fact that there was no longer an intact family, the fact that the child referred to putative father as "my dad," and the fact that mother had misrepresented the paternity of the child to her husband, which blocked application of paternity by estoppel doctrine); Dettinger v. McCleary, 438 Pa.Super. 300, 302-04, 652 A.2d 383, 385 (1994) ("critical to a resolution of any paternity claim is a determination of the relationship of the parties based upon the facts."). In essence, the decisions lean toward blending estoppel doctrine and other factors, in particular, intact family

considerations and the relationship of the "father" and child. Cf. Gulla, 408 Pa.Super. at 279-80, 596 A.2d at 856 (emphasizing that the proper focus is on the relationship between father and child).

In Jones v. Trojak, our supreme court blended the principles of paternity by estoppel with the presumption that a child born to a married woman is the child of the marriage. There, the mother brought a support action against the putative father, Joseph Trojak. At the time the child was born, the mother was married to and living with William Jones. The trial court ordered blood tests. At trial, Trojak objected to the admission of the tests. The Pennsylvania Supreme Court stated:

> [U]nder certain circumstances, a person might be estopped from challenging paternity where that person has by his or her conduct accepted a given person as the father of the child. . . . In this case, however, we agree with the trial court and are convinced that the facts indicate that the presumptive father and mother repudiated their marriage vows long ago. Additionally, we have evidence that the presumptive father did not accept the child as his own. The circumstances before us, as found by the trial court, are that the presumptive father has never financially or emotionally supported Katie. . . . Thus, we agree with the Superior Court that there being no intact family considerations present, a determination regarding Trojak's [the putative father] paternity is necessary to resolve the child support claim made by Jones.

535 Pa. at 105-06, 634 A.2d at 206-207.

Appendix A

In Kohler v. Bleem, the trial court determined that clear and convincing evidence of the presumptive father's sterility rebutted the presumption of paternity. Notwithstanding this determination, the trial court applied the doctrine of paternity by estoppel. The court believed it was compelled to do so because of the presumptive father's actions in embracing the child as his own during the early years of the child's life. Kohler v. Bleem, 439 Pa.Super. at 391-92, 654 A.2d at 573. This court reversed, finding that the doctrine could not be applied to the facts presented in that case. We stated:

> What the trial court neglected to consider, however, is the role of estoppel principles in a factual situation such as this, that is, one involving fraud and misrepresentation and the absence of an intact family. The confusion in this case arises from the fact that Mr. Kohler did accept Leslie as his daughter, knowing that she was not his child. This brings into play the paternity by estoppel doctrine. Mr. Kohler, however, was operating under the misrepresentation that an "unknown" man had fathered the child. But for this fact, Mr. Kohler indicated that he would have left his wife immediately. In fact, Mr. Kohler did so when he was told that Mr. Bleem [the Kohlers' next-door neighbor] was Leslie's natural father.

Id. at 399, 654 A.2d at 576.

In Dettinger v. McCleary, supra, the putative father, Mark Dettinger, attempted to call into question the paternity of the child at issue and the family relationship of the mother, Cheryl McCleary, the father, Michael McCleary, and the child. The

child was born at a time when mother was married to Dettinger. In remanding this case due to premature dismissal, this court stated:

> The trial court was unable to determine, based upon the posture of the case, whether husband [McCleary] ever assumed a parental role concerning this child causing a family bond to develop, or whether Appellant [Dettinger] was acknowledged all along to be the father of the child. If, as [Dettinger] alleges, such disruption existed in the relationship so that a family unit was never established, then there are no family interests to preserve. . . . If upon receipt of testimony the court concludes that mother, husband and the child exist as a family, or that they once did so, allowing a parent-child bond to develop, the presumption will stand. If[,] however[,] the court concludes, as in Jones, that there is no "family unit" to protect because a familial relationship was never created or because the parties acknowledged [Dettinger's] role as father to the child, then [Dettinger] is to be permitted to offer evidence of paternity [blood tests]. In the latter instance, the purpose for the presumption no longer exists.

Id. at 304-05, 652 A.2d at 386.

As indicated by his statement of issues and argument, Gerald attempts to place this case squarely within the confines of Kohler v. Bleem. We acknowledge the unusual circumstances in Kohler, and reiterate the clarifications made in that case:

> [I]f the matter involves a child born out of wedlock, no presumptions apply and the determination will turn on application of estoppel principles to the particular facts of the case. See In the Matter of Naja Green, 437 Pa.Super. 606, 650 A.2d 1072 (1994); Jefferson [v. Perry, 432 Pa.Super. 651, 639 A.2d 830 (1994)]; Everett [v. Anglemeyer, 425 Pa.Super. 587, 625 A.2d 1252 (1993)]. See also 23 Pa.C.S.A. § 5102(b). Second, if the matter involves a child born during wedlock, the presumption automatically applies but may be rebutted by clear and convincing evidence of non-access or impotency/sterility. [Commonwealth ex rel. Goldman v.] Goldman, 199 Pa.Super. 274, 184 A.2d 351 (1962) ... Additionally, application of estoppel principles may be employed to determine whether the presumption may be rebutted. If estoppel principles are applicable, the presumption will generally prevail.

Id. at 393-95, 654 A.2d at 574 (emphasis added).

Contrary to Gerald's contention, we do not find that this case fits within the narrow confines of Kohler, supra. We acknowledge that the strength of the presumption has been relaxed by additional considerations; however, those unique considerations are not present here. Rather, we find that the facts of this case are more closely analogous to those in Commonwealth ex rel. Goldman v. Goldman, 199 Pa.Super. 274, 184 A.2d 351 (1962). There, the parties, husband and wife, had three children. Pending a divorce action, wife sought support from husband for the three children. Husband filed a petition denying paternity and requested that the court order blood tests. The court granted the request, and wife appealed.

Appendix A

This court, discussing the applicability of the blood testing statute, stated:

> We recognize that there is something disgusting about a husband who, moved by bitterness toward his wife, suddenly questions the legitimacy of her child whom he had been accepting and recognizing as his own. . . . Where the husband has accepted his wife's child and held it out as his own over a period of time, he is estopped from denying paternity.

Goldman, 199 Pa.Super. at 282-83, 184 A.2d at 355.

Here, the trial court refused Gerald's request for blood testing because it determined that the presumption of paternity had not been overcome. The trial court found that the evidence presented did not clearly and convincingly establish non-access, sterility, or impotency. In Kohler, unlike here, the presumption had been rebutted by evidence of the husband's sterility; despite the fact that the paternity by estoppel principles could be applied to preclude husband from denying paternity, this court found other considerations significant, including the mother's subterfuge, which prompted this court to apply estoppel principles in favor of the husband, and the significant relationship established between the putative father and the child. Kohler, 439 Pa.Super. at 399-401, 654 A.2d at 577.

Here, Gerald clearly had an established relationship with his son. Like in Goldman, he did not question it until after the relationship between him and his wife deteriorated. Although the family is not now intact, cf. Kohler, supra, a familial relationship existed at the time the child was born and, more significantly, a parent-child bond was formed. Despite Gerald's

unilateral termination of this relationship and his decision to notify the child that he was not his father, we find that a considered application of the myriad factors involved to the facts of this case warrant a finding that the relationship still exists at law. Gerald has offered no evidence of non-access, sterility or impotency. Paulshock, supra. Significantly, Gerald offers no evidence, other than his hunch of non-paternity based on eye color, that a relationship has been forged with a putative father or that estoppel principles are applicable in his favor, thus blocking application of the doctrine of paternity by estoppel. Kohler, supra.

We conclude, therefore, that the trial court properly concluded that the presumption of paternity had not been rebutted by clear and convincing evidence, and, as such, properly denied Gerald's request for blood tests.

Order affirmed.

APPENDIX B — ORDER OF THE COURT OF COMMON PLEAS OF BERKS COUNTY DATED MARCH 22, 1996

"AND NOW, March 12, 1996, after consideration of the record and briefs of counsel, defendant's Petition for Discovery is dismissed and his request for the introduction of DNA results and/or blood tests is denied. All funds which have been held in escrow shall be immediately released to plaintiff or to the Department of Public Welfare as her assignee.

BY THE COURT:

/s/
ARTHUR E. GRIM, J."

APPENDIX C — MEMORANDUM OPINION OF THE COURT OF COMMON PLEAS OF BERKS COUNTY DATED MARCH 8, 1996

IN THE COURT OF COMMON PLEAS
OF BERKS COUNTY, PENNSYLVANIA
DOMESTIC RELATIONS SECTION

No. 95-1692-00

ELIZABETH O. MISCOVICH

vs.

GERALD ALLAN MISCOVICH

* * *

MEMORANDUM OPINION, GRIM, J.

Dated: March 8, 1996.

Before the court are defendant's Petition for discovery and request for the admission of blood tests or DNA tests. Since the facts are undisputed, no hearing was held. The parties submitted briefs on the legal issues. The following are the pertinent facts.

The parties were married on July 26, 1986. A child, Gerald Anthony Miscovich, was born during the marriage in December, 1987. The parties separated in October, 1989. On March 9, 1990, they executed a property agreement which included terms for child support. The parties were divorced in December, 1990.

In December, 1991, defendant, Gerald Allan Miscovich, became aware of Mendel's Law. Both parties have blue eyes

but the child, Gerald, possesses brown eyes. Defendant had a DNA analysis performed on himself and the child in January, 1992. The DNA tests excluded defendant as the father. Defendant was informed about the results of the testing in March, 1992. At that time he informed the child that he was not his father and ended all contact with him. Plaintiff, Elizabeth O. Miscovich, subsequently filed a support action against another man.

Defendant wants the parties and child to submit to paternity testing and to be permitted to take plaintiff's deposition. Plaintiff denies his right to such relief.

23 Pa.C.S.A. Section 5104(c) grants the authority for blood tests to be taken to determine paternity:

> In any matter subject to this section in which paternity, parentage or identity of a child is a relevant fact, the court, upon its own initiative or upon suggestion made by or on behalf of any person whose blood is involved, may or, upon motion of any party to the action made at a time so as not to delay the proceedings unduly, shall order the mother, child and alleged father to submit to blood tests. If any party refuses to submit to the tests, the court may resolve the question of paternity, parentage or identify of a child against the party to enforce its order if the rights of others and the interests of justice so require.

The Pennsylvania appellate courts have held that this statutorily allowed blood testing may not be used to rebut paternity in the first instance and that only following the rebuttal

of the presumption that a child is the child of the marriage by clear and convincing evidence, does the blood test become relevant to determine paternity and to establish a probability that a party is or is not the parent of a child.

The presumption that a child born during a marriage is the child of the husband is always the starting point in a contest involving the parentage of a child born during coverture. *Paulshock v. Bonomo*, __ Pa. Super. __, 661 A.2d 1386 (1995).

The clear and convincing evidence which is needed to overcome this presumption is that the husband was incapable of procreation or had no access to the wife during the relevant period. *Everett v. Anglemyer*, 425 Pa. Super. 587, 625 A.2d 1252 (1993). In the case *sub judice* defendant does not claim that he was incapable of procreation or that he did not have access to plaintiff during the period of conception.

Defendant alleges that his clear and convincing evidence consists of Mendel's Law and results of DNA tests. No case law exists which provides that these grounds overcome the presumption of legitimacy. Thus, even if the DNA tests tended to exclude defendant as the father, they are irrelevant to the determination of paternity since the child was born during coverture and the presumption has not been overcome. *Paulshock v. Bonomo*, __ Pa. Super.__, 661 A.2d 1386 (1995).

Assuming *arguendo* that defendant has overcome the presumption that a child born during a marriage is the child of that marriage, the court could still not order blood tests because defendant is precluded from denying paternity under the doctrine of res judicata. A legal determination of paternity for custody or support purposes, unappealed from, forecloses any

further litigation on that issue. *McCue v. McCue*, 413 Pa. Super. 71, 604 A.2d 738 (1992).

In the case at bar, defendant entered into a property settlement agreement which provided for child support. Thus, he has already acknowledged paternity of the subject child in a prior proceeding between the parties. It does not matter that afterwards defendant has discovered evidence which tends to exclude him as the father. In *Manze v. Manze*, 362 Pa. Super. 153, 523 A.2d 821 (1987), the court held that a former husband, having previously entered into a court order to support a child, was thereafter precluded by res judicata from denying paternity as a basis for terminating support payments to his former spouse by reason of blood testing which excluded him as the child's father. Under the law defendant is Gerald's father.

APPENDIX D — ORDER OF THE SUPREME COURT OF PENNSYLVANIA DATED AND DECIDED DECEMBER 14, 1998

Elizabeth O. MISCOVICH

v.

Gerald Allan MISCOVICH, Appellant.

Supreme Court of Pennsylvania.

Decided Dec. 14, 1998.

Appeal No. 36 M.D. 1998, from Order of Superior Court, 455 Pa.Super. 437, 688 A.2d 726 (1997), entered January 10, 1997, at No. 1340 Philadelphia 1996, Affirming Order of Court of Common Pleas of Berks County, Civil Division, entered March 12, 1996, at No. 95-1692-00; Arthur E. Grim, Judge.

* * *

Before FLAHERTY, C.J., and ZAPPALA, CAPPY, CASTILLE, NIGRO and NEWMAN, JJ.

ORDER

PER CURIAM:

The Court being equally divided, the Order of the Superior Court is affirmed.

SAYLOR, J., did not participate in the consideration or decision of this case.

Appendix D

CASTILLE, NIGRO and NEWMAN, JJ., would reverse the Order of the Superior Court.